I think whether O. 53 High Court Rules 1980 has been satisfied duly must be derived on whether its objective of trying to answer simply whether an arguable case for the granting of relief by the applicant is capable of being made out. If the answer is in the negative it has not satisfied that order.

In my view, by reading the statement (not in affidavit), particularly the reliefs sought and the grounds which consist of statement of Court records and the affidavit in due form, stating the facts on oath, I am of the view that O. 53 had been complied with as when they are together read, answer that an arguable case can be made out if the applicant succeeds in his proof. I therefore find that the respondent has no merit in his objection.

For reasons given above, I dismissed the respondent's application in enclosure (10) with costs to the applicant and I hereby order that Penolong Kanan Pendaftar do fix a date for the hearing of the applicant's substantive motion in enclosure (6).

PUBLIC PROSECUTOR

v.

DATUK HJ. ABDUL HALIK KHANIZAMAN KHAN

HIGH COURT, KOTA KINABALU
TUAN IAN H.C. CHIN J.
[CRIMINAL APPEAL NO. 12 OF 1992]
12 FEBRUARY 1994

CRIMINAL APPEAL: Charge of corruptly accepting gratification - Section 4(a) Prevention of Corruption Act 1961 - Acquittal - Whether justified - Accomplice evidence - Whether corroborated - Non-admissibility of uncorroborated accomplice evidence - Departure from rule - Whether special circumstances existed.

EVIDENCE: Discrepancies - Court unable to sieve truths from lies in evidence of witness - Whether evidence not to be acted upon - Whether rejection of evidence in toto justified.

This was an appeal by the Public Prosecutor against the acquittal of the respondent on a charge under s. 4(a) of the Prevention of Corruption Act 1961, for corrupt acceptance of gratification. Before the learned Sessions Judge, evidence was led that the appellant, as Chairman of the Sabah Land Development Board (the Board), had corruptly asked for and received a cash cheque for RM60,000 from two businessman (Abdul and Michael) as a favour for releasing to the said Abdul and Michael advance payment of RM500,000 for some roadwork to be undertaken by a company for the Board. Evidence was further led that after receiving the cash cheque the respondent handed the cheque to one Teo for cashing, and that the said Teo had in turn handed the same to Annuar Nu, since deceased, who eventually cashed the cheque and handed the cash money back to Teo.

Teo gave evidence that he handed over the RM60,000 to the respondent on the same day he received the said cheque. But his evidence on many other points were full of discrepancies that the learned Sessions Judge ruled that he "proved to be the most difficult witness, who was prepared to lie, be elusive and evasive" and made a finding that it was dangerous to act on his evidence. The learned Judge further ruled that both Michael and Abdul were accomplices whose evidence must be corroborated and since no corroboration was forthcoming, their

evidence was inadmissible. These were essentially the grounds upon which the order for acquittal was based.

The issues were:

(1) Whether the conclusion of the learned Trial Judge that Abdul and Michael were accomplices was justified and if so, whether the learned Judge was right in concluding that there was no corroboration of their evidence.
(2) Whether the rejection of the entire evidence of Teo was, in the circumstances of the case, proper and justified.

Held:

[1] There are ample evidence to show that Abdul and Michael had actively participated in the commission of the offence thereby justifying the conclusion of the learned Sessions Judge that they were in fact accomplices and that they could not seek the protection of s. 18 of the Prevention of Corruption Act 1961.

[2] Where an accomplice evidence is not independently corroborated it is unsafe to convict on such evidence unless there are special circumstances. Among the types of cases that justify a departure from the normal rule requiring corroboration of an accomplice evidence are cases involving an accomplice of high character and the offence is not one that carries any serious moral stigma. The offence of corruption carries with it a serious moral stigma. Therefore the learned Sessions Judge was right in concluding that there must be corroboration of the evidence of Abdul and Michael.

[3] The evidence of Teo, if accepted, do provide corroboration of the essential particulars positively implicating the accused with the offence. But his evidence are so intermingled with lies and truths that they were incapable of being sieved. The law is clear that when the truth and falsehood are so intermingled as to make it impossible to seperate them, the evidence has to be rejected in it's entirety. The rejection in toto of Teo's evidence by the learned Sessions Judge is therefore right and well founded.

[Appeal dismissed].

Cases referred to:

Ng Kok Lian & Anor. v. PP [1983] 2 MLJ 379 ***(refd)***
Daimon bin Banda v. PP [1951] MLJ 11 ***(refd)***
R v. Lim Yam Hong 14 SSLR 152 ***(foll)***
T.N. Nathan v. PP [1978] 1 MLJ 134 ***(refd)***
PP v. Datuk Hj. Harun bin Hj. Idris [1977] 2 MLJ 14 ***(refd)***
Yap Ee Kong & Anor. v. PP [1981] 1 MLJ 144 FC ***(refd)***
Dowse v. Attorney-General, Federation of Malaysia [1961] MLJ 249 PC ***(refd)***
Abraham Ho Ah Loke v. William Manson-Hin [1949] MLJ 37 ***(refd)***
Tua Kin Ling v. PP [1970] 2 MLJ 61 ***(refd)***
Kanbi Nanji Virji & Ors. v. State of Gujarat AIR [1970] SC 219 ***(foll)***
Khoo Cheng Huat v. PP [1991] 1 MLJ 42 ***(foll)***
Goh Ah Yew v. PP [1949] MLJ 150 ***(foll)***
Perisamy v. PP [1966] 1 MLJ 138 ***(refd)***

Legislation referred to:

Prevention of Corruption Act 1961, ss. 4(a), 18

For the public prosecutor - Masri Mohd. Daud, DPP
For the respondent - V. Balasingam; M/s. S.H. Leong & Gabriel Ho

JUDGMENT

Ian H.C. Chin J:

This is an appeal by the public prosecutor against the decision of the learned Sessions Judge handed down on 21 May 1991. Datuk Hj. Halik Khanizaman Khan ("the accused") was at the end of the case discharged and acquitted of the following charge, viz:

> That you on 11 February 1981 between the hours of 8.00 a.m. and 4.00 p.m., at the Sabah Land Development Board Headquarters, Kota Kinabalu, in the District of Kota Kinabalu, in the State of Sabah, being an agent of the Government of Malaysia, to wit, the Chairman of the Sabah Land Development Board, Kota Kinabalu, Sabah, did corruptly accept from YB Pengiran Abdul Khafid and Michael Hastie of KASDA (S) Sdn. Bhd., for yourself a gratification, to wit, Sabah Bank Bhd. cash cheque No. 203415 dated 11 February 1981 for RM60,000 as an inducement for doing an act in relation to your principal's affairs, to wit, to release the Bank Negara cheque No. 371377 dated 11 February 1981 for RM500,000 being the 1st advance for the access road project to YB. Pengiran Abdul Khafid and that you thereby committed an offence punishable under s. 4(a) of the Prevention of Corruption Act 42/61 (Laws of Malaysia Act No. 57).

At the end of the case for the prosecution, the evidence are as follows. A company called Kasda (S) Sdn. Bhd. ("the company") was awarded a contract to develop certain land for the Sabah Land Development Board ("the Board") but there was no road leading to the said land. The company had as its chairman, a then state

assemblyman named Pengiran Abdul Khafid ("Abdul") and as its general manager, a person called Michael Hastie Robert ("Michael"). These two were authorised signatories of a banking account of the company. To facilitate the building of an access road to the said land, Abdul wrote to the then Chief Minister of Sabah on 11 February 1981 to ask for an advance payment of RM1,500,000 from the sums payable under the contract by the Board to the company and out of which advance, a sum of RM500,000 was supposed to be immediately payable on 11 February 1981. This was approved. The accused was then the chairman of the Board. At the relevant time, one Teo Ban Tong ("Teo") was the Board's Beaufort regional manager. Abdul's testimony was to the effect that the accused on 11 February 1981 asked for RM60,000 (as "bayaran sagu hati" - consolation payment) before the accused would release the cheque for the said advance of RM500,000. A cash cheque for RM60,000, signed by Abdul and Michael, was issued and was, on 11 February 1981, handed over to the accused by Abdul and it was after this that Abdul was handed the cheque for the advance payment of RM500,000. This meeting with the accused was confirmed by Michael who went along and he also testified that the release of the sum of RM500,000 was conditional upon the payment to the accused of the sum of RM60,000. On 12 February 1981, Teo, upon the request of the accused, came down from Beaufort to Kota Kinabalu and was given, by the accused, the RM60,000 cheque at either 9.00 a.m. or 12.00 noon. Teo was on his way to cash the cheque when he happened to meet a Annuar Lu who cashed the cheque for him and gave the RM60,000 cash to Teo. Teo handed the money (RM60,000) to the accused. It ought to be noted that time had taken its toll - two persons could not be called as witnesses and instead the notes of the evidence which they gave at a previous trial were tendered and read in Court as evidence and these two witnesses, who had passed away, were the said Annuar Lu, who had testified for the prosecution, while the other was Awang Setia, the scheme manager of the Mawao Scheme, Beaufort, who had testified for the defence in an earlier trial.

The accused gave evidence on oath. He denied receiving the RM60,000 cheque and the cash. He denied having asked Teo to come down to Kota Kinabalu from Beaufort to cash the cheque. The defence produced a page of the visitor's note-book, signed by the accused, which showed that the accused was on 12 February 1981 at 9.00 a.m. visiting the Mawao Scheme, Beaufort, and therefore, to show he was not in Kota Kinabalu. One Sibidol bin Kantod, an employee of the Telecommunications Department, was called and he testified that there was no telephone line installed at the Beaufort regional manager's office. One Yusoff bin Lahir, the driver of the accused, also testified and his testimony was to the effect that he drove the accused from his house to the Mawao Scheme, Beaufort, on 12 February 1981 at 7.00 a.m. and that they thereafter left Mawao Scheme, Beaufort, at 10.30 a.m. and only reached the office of the Board at Kota Kinabalu at 12.30 p.m. He testified that the accused only left the office at 2.00 p.m. Pages of Awang Setia's diary were produced to show that the visit to Mawao Scheme, Beaufort, was on the agenda when Awang Setia met the accused in Kota Kinabalu on 4 February 1981. Another page of the diary also showed the accused had visited the Mawao Scheme, Beaufort, on 12 February 1981 at 9.00 a.m. Those are briefly the evidence of this case. The learned Sessions Judge had in his judgment set out the facts of this case in far more detail and I will refer to them when I deal with the various grounds of appeal.

The first of the grounds argued by Mr. Masri Mohd. Daud, Deputy Public Prosecutor, was that the learned Sessions Judge erred when he held that Abdul and Michael were accomplices. The learned Deputy argued that these two persons did not take any active part in offering the bribe and he referred the Court to Abdul's evidence where he testified that the accused had requested the cheque for RM60,000 but the learned Deputy did not advert to the evidence which the learned Sessions Judge referred to as supporting his conclusion that Abdul and Michael "played an active part in the whole transaction", and these evidence are:

(1) Abdul and Michael did not report either to the police or the anti-corruption agency the alleged demand for the bribe;
(2) Abdul and Michael said they gave the bribe in the interest of the company and that they had anticipated that a certain amount had to be paid to the accused when the accused had not asked for the bribe;
(3) Michael said there was a general discussion between the accused and Abdul concerning the payment and that he had to

leave the room to facilitate the discussion and Michael also signed the cheque in payment of the bribe;

(4) Abdul said he paid the bribe knowing full well it was against the law but still pay because he did not want the project delayed and he was interested in government project; and

(5) The absence of evidence to show that Abdul and Michael resented or objected to the payment of the bribe.

It was upon the evidence that I have just set out that the learned Sessions Judge came to the conclusion that Abdul and Michael were accomplices who actively participated in the commission of the offence and therefore cannot seek the protection of s. 18 of the Prevention of Corruption Act 1961 ("the Act"). The learned Sessions Judge therefore, concluded, and rightly so if I may add, that their evidence must be corroborated. This conclusion, I am of the opinion, was arrived at after a close scrutiny of the evidence of Abdul and Michael and there are ample reasons, which I have set out, supra, to justify the conclusions of the learned Sessions Judge. It is obvious from the judgment of the learned Sessions Judge that he was mindful of the reminder, given in *Ng Kok Lian & Anor. v. PP* [1983] 2 MLJ 379, at p. 382, that the Court must not automatically come to the conclusion that a giver of a bribe must be an accomplice without close scrutiny of the evidence. As for s. 18 of the Act, Mr. V. Balasingam took me through a host of authorities regarding the treatment to be accorded to the said section. For ease of reference, I reproduce s. 18 of the Act, viz:

> 18. Evidence of Accomplice.
>
> Notwithstanding any rule of law or written law to the contrary, no witness shall, in any such trial or inquiry as is referred to in s. 17, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.

It is laid down in *Daimon bin Banda v. PP* [1951] MLJ 11 that a similar section in the predecessor of the Act does not abrogate the rule that, where an accomplice evidence is not independently corroborated, it is unsafe to convict on such evidence unless there are special circumstances. That Court also held that the similar section is an exception to a standing rule of evidence which must be construed strictly. As for the type of cases that justify a departure from the normal rule requiring corroboration of an accomplice evidence, it was said in *R v. Lim Yam Hong* 14 SSLR 152, at p. 167, that such a case would be that involving an accomplice of high character and the offence is not one that carries any serious moral stigma. However, it was held in *T.N. Nathan v. PP* [1978] 1 MLJ 134, at p. 136, that the offence of corruption carries with it a serious moral stigma. Therefore, the learned Sessions Judge, having taken those principles of law in mind, was right in concluding that there must be corroboration of the evidence of Abdul and Michael. The learned deputy then submitted that corroboration can be found in the evidence of Teo and referred, *inter alia*, to *PP v. Datuk Hj Harun bin Hj Idris* [1977] 2 MLJ 14 at p. 19-20, where it is said:

> The object of corroboration is no doubt to satisfy the Court that the witnesses are telling the truth and that it is reasonably safe to act upon them. It is not necessary that the corroboration should be of the actual commission of the crime, for then there would be independent evidence of the commission of the offence. It would be enough if there is independent evidence of relevant circumstances connecting the accused with the crime.

The law regarding what constitutes corroboration is long settled and I do not think it necessary to cite long passages. It is sufficient that I merely mention the case of *Yap Ee Kong & Anor. v. PP* [1981] 1 MLJ 144 FC, at p. 146 and *Dowse v. Attorney-General, Federation of Malaysia* [1961] MLJ 249 PC, at p. 252 where the law is succintly stated there. The evidence of Teo, which I have summarised, supra, if accepted, do provide corroboration of the essential particulars positively implicating the accused with the offence. In this regard the learned Deputy had urged this appeal Court to accept the evidence of Teo and to disregard the discrepancies in his evidence. The learned Deputy referred to *Abraham Ho Ah Loke v. William Manson-Hin* [1949] MLJ 37 where the Court there held, that though an appellate tribunal will generally defer to the opinion of a trial Judge on the demeanour of a witness whom he has seen, nevertheless, it is the duty of the appellate tribunal to check by critical examination the whole of the evidence of the trial Judge's conclusion as to the truthfulness of that witness and it was also held, that the credibility of a witness's story should be based on its inherent consistency with the facts and circumstances alleged therein.

Also cited by the learned deputy was *Tua Kin Ling v. PP* [1970] 2 MLJ 61 where it is held, that if a witness lied on one or two points it does not necessarily follow that his whole evidence ought to be rejected and the Court has a duty to sieve the evidence to ascertain what are the parts of the evidence tending to incriminate the accused which could be accepted. Here again, there is no dispute as to the legal principles. With that I will now proceed to summarise the criticism of the evidence of Teo by the Sessions Judge. The evidence of Teo elicited by examination-in-chief, according to the learned Sessions Judge, was brief and lacking details. The time and place Teo met the accused and handed the RM60,000 cheque were elicited by cross-examination but even then Teo, apart from repeatedly saying that he could not remember, kept changing his evidence, particularly in regard to time. For instance, Teo vacillated between the two time of 9.30 a.m. and 12.00 p.m as to when Teo reached the accused office on 12 February 1981. The learned Sessions Judge also criticised Teo's inconsistency in his testimony which, in one breadth, he said it was in a coffee shop he met Annuar Lu where he gave RM60,000 cheque to him to cash but which evidence was, in the next breadth, changed to that of having met Annuar Lu in the bank instead of the coffee shop. Teo also said he did not know the RM60,000 cheque belonged to the company of Abdul but he changed his testimony and said he knew. When questioned as to his trip with a Mr. Goh and whether it was paid by Mr. Goh, Teo, according to the learned Sessions Judge, was elusive and not forthright. It was also pointed out by the learned Sessions Judge that there was no possibility of Teo receiving a phone call to come down to see the accused when at that particular time, according to an impartial witness called by the accused, there was still no telephone line connecting the accused's office with the office in Beaufort where Teo was. The learned Sessions Judge then rounded up his criticism of Teo by saying that Teo "proved to be the most difficult witness to deal with, who was prepared to lie, be elusive and evasive" and that, therefore, Teo was unreliable and that it was dangerous to act on his evidence. The learned Deputy argued that despite all the unsatisfactory nature of Teo's evidence that the learned Sessions Judge had pointed out, they do not discredit the fact that Teo had met Annuar Lu where the RM60,000 cheque was handed by Teo to Annuar Lu for cashing. The learned Session Judge had given his reasons, very valid at that if I may add, for totally disbelieving Teo and the learned Deputy had not been able to say how and why the learned Sessions Judge was wrong in coming to that conclusion. As for Annuar Lu, his evidence was in cold print, that is, in the form of evidence recorded before his death and given in a former trial, and the learned Sessions Judge opined that he found it difficult to reconcile Annuar Lu's evidence with that of Teo and therefore, without the benefit of watching Annuar Lu give evidence, he was not sure whether Annuar Lu's evidence is the truth. Here too, the learned Deputy had failed to show how that conclusion of the learned Sessions Judge is wrong. Though the learned Sessions Judge did not say so in so many words, he is obviously of the opinion, and I too, that the evidence of Teo are so intermingled with lies and truths and incapable of being sieved that he rejected the evidence of Teo in total. When the evidence are such as found by the learned Sessions Judge, he is, I agree with Mr. V. Balasingam, entitled to that conclusion. This was exactly what was said in *Kanbi Nanji Virji & Ors. v. State of Gujarat* AIR [1970] SC 219, viz:

> It is true that often times the Courts have to separate the truth from falsehood. But where the two are so intermingled as to make it impossible to separate them, the evidence has to be rejected in its entirety.

See also *Khoo Cheng Huat v. PP* [1991] 1 MLJ 42, at p. 86, per Edgar Joseph Jr. J. (as he then was) and *Goh Ah Yew v. PP* [1949] MLJ 150, at p. 153, for similar statements of this principle of law.

The final sortie of the learned Deputy was on the defence of alibi but he could not even make a dent. He submitted that the said driver's evidence could not be accepted because it is inherently improbable that the driver could remember the date and that the said visitors book also should not be accepted as it could have been tampered by the insertion of the date since it was accessible by other people. If it is inherently improbable that anyone could remember any date, than none of the prosecution witnesses evidence regarding the date and time certain events occurred could be accepted. But the driver's evidence is corroborated by the visitors' book. The learned Deputy is asking the Court to act on pure conjecture, that is, that the visitors book could have been tampered, to reject the evidence of the visitors book. The short answer

to that, as pointed out by Mr. Balasingam and which I agree, can be found in *Perisamy v. PP* [1966] 1 MLJ 138, at p. 139, where it is said that an appeal court "must confine itself strictly to the evidence on the record rather than indulge in surmise". There is absolutely no evidence to show that the visitors' book (showing the accused to be in Beaufort, and not in Kota Kinabalu where the accused was alleged to have given the RM60,000 cheque to Teo) was manufactured. Therefore, there is no substance in this ground of appeal. With that, I have dealt with all the grounds advanced by the learned Deputy who has made an admirable effort to argue this appeal even though the obstacles seem insurmountable. This judgment is made so much easier to make and write because every point was ably argued, and backed up by authorities, by Mr. Balasingam, for which I wish to thank Counsel. I dismiss the appeal of the Public Prosecutor.

As for the accused, he has been freed by the Sessions Court and now the High Court, both of which are constituted by not infallible mortals. But, we are supposedly a nation of God-fearing people which means that the accused, despite having gone through the Courts, will, nevertheless, have to in the future receive the judgment, in his case, of Allah, whether or not he is in fact God-fearing.

PUBLIC PROSECUTOR

v.

LAU SIEW NGUONG & ANOR.

HIGH COURT, SIBU
TUAN HJ. MUHAMMAD KAMIL
BIN AWANG JC
[CRIMINAL APPEAL NO. 41 OF 1991]
11 OCTOBER 1993

CRIMINAL LAW & PROCEDURE: Charge of being concerned in the importation of prohibited goods - Whether charge proved - Prosecution's appeal against acquittal - Magistrate ordering the goods to be confiscated - Respondents appeal against order of forfeiture.

The respondents were charged with being jointly concerned in the importation of prohibited goods, an offence under s. 135(1)(a) of the Customs Act 1967 (the Act). The prosecution claimed that the respondents had attemped to claim two containers of frozen chicken wings. The respondents produced two declaration forms which were not complete as the import permits (the AP) were not attached. The AP were only produced the next day and the prosecution claimed that the respondents had thereby contravened s. 135(1)(a) of the Act.

The respondents contended that they could not obtain the AP on the day the chicken wings arrived as the veterinary officer stationed in Sibu was away on travelling duty and consequently they had to obtain the AP from the Veterinary Department at Kuching which caused a delay of one day.

The learned Magistrate accepted the respondents explanation and held that the respondents did not have the intention to evade the law. The respondents were acquitted and discharged by the learned Magistrate who then went on to order the confiscation of the frozen chicken wings.

The prosecution appealed against the order of acquittal and discharge and the respondents appealed against the order for forfeiture of the chicken wings.

Held:

[1] Insofar as the prosecutions appeal is concerned, the learned Magistrate had not misdirected himself on the facts of the case and he had come to a correct decision.